82-1193

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. _____

MOHAMMAD H. MARASHI, Petitioner

v.

FORBES FURNITURE COMPANY, Respondent, and
PEERLESS INSURANCE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEALS, FIFTH DISTRICT

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Counsel for Petitioner

January 3, 1983

QUESTIONS PRESENTED

Whether Petitioner, MOHAMMAD H. MARASHI, has been denied due process of law within the meaning of the Fifth and Fourteenth Amendment to the United States Constitution when

a) the trial judge refused to continue the trial though Petitioner, an Iranian and outside the United States, could not be present for the proceedings of the case due to the restrictive immigration policies of the Federal Government. (b) Petitioner was denied his right to due process of law by the trial court's denial of Petitioner's motion for relief from the judgment when such decision was against all the evidence presented at the hearing. (c) when the trial judge's award of attorney's fees for Respondent, Forbes Furniture Company, was based upon the Petitioner's failure to

present a meritorious defense even though the Petitioner could not re-enter the United States to present his defense.

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v.

FORBES FURNITURE COMPANY, Respondent, and
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PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEALS,
FIFTH DISTRICT

THE PETITIONER, MOHAMMAD H. MARASHI, respectfully prays that a writ of certiorari issue to review the judgments of the Florida District Court of Appeals, Fifth District, entered in this proceeding on April 7, 1982 and on August 26, 1982.

OPINION BELOW

The orders of the Florida District Court of Appeals, Fifth District, dated April 7, 1982 and August 26, 1982, appear in the appendix hereto. No opinion was rendered by the court.

JURISDICTION

The trial court entered its judgment on January 26, 1981. On April 7, 1982, Florida District Court of Appeals, Fifth District, affirmed the judgment without opinion. The trial court denied a timely motion for relief from the judgment on June 17, 1982. A timely appeal of the denial of the motion for relief to the Florida District Court of Appeal, Fifth District was dismissed on August 26, 1982. The Florida Supreme Court dismissed Petitioner's timely appeal on October 5, 1982 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC

§1257(3) and is based upon a deprivation of the Petitioner's rights afforded by Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ... ..."

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> "... ... nor shall any state deprive any person of life, liberty or property, without due process of law; ..."

SECTION 57.105 FLORIDA STATUTES

> "The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party."

STATEMENT OF THE CASE

This case arose between Petitioner (hereinafter referred to as Marashi) and Forbes Furniture Company (hereinafter referred to as Forbes). The Complaint, filed by Forbes on June 27, 1980, sought damages for goods sold by Forbes to Marashi while Marashi was residing in the United States. Marashi maintained that the amount of money sought by Forbes did not accurately reflect the contract price, that the invoices contained several charges for items that were properly rejected by Marashi, and that the amount owed had been satisfied. Subsequent to service, Mr. Marashi left the United States on business and was denied re-entry by the State Department in light of his Iranian citizenship and the hostage crisis. In July, counsel for Marashi filed an answer containing several affirmative defenses in which Marashi

alleged his position. On August 21, 1980, Forbes filed a motion for summary judgment. Counsel for Marashi attempted to counter the motion with affidavits. However, because Marashi, was not able to re-enter due to the restrictive immigration policy established by the Federal Government, counsel for Marashi was unable to obtain the required affidavit from the Petitioner. Only Marashi, himself, could provide the evidence required to defend the claim. Counsel for Marashi, therefore, requested a continuance on the motion for summary judgment. The motion was based on Marashi's inability to return to the United States and on Marashi's desire to defend the law suit.

On October 3, 1980, the trial court continued the summary judgment hearing for 17 days. Counsel for Marashi again filed a motion for continuance and an affidavit

of one of the sons of Marashi in opposition to the summary judgment. The affidavit again recited that Marashi was outside of the United States and was unable to return (A/7). On October 20, 1980, the trial court granted Forbes a summary judgment on all issues but the affirmative defenses as to rejection of only a few items. A trial date of January 13, 1981 was set. At the trial, Marashi's counsel, again, moved for a continuance due to Marashi's inability to re-enter the United States, (A/5). No witnesses appeared at the trial for Marashi because Marashi was the only party who had knowledge of the transactions. On January 26, 1981, the trial court entered a final judgment against Marashi for damages. The final judgment also was for attorney's fees based on Marashi's failure to present a defense, (A/8). On February 25, 1981, a Notice of Appeal was served and filed. In

Petitioner's appellate brief, it was argued that Marashi was denied his right of due process guaranteed by the Fifth and Fourteenth Amendments because the trial court proceeded without Marashi being able to be present and that such denial of the continuance and the award of attorneys fees constituted a gross abuse of discretion, (A/23). On April 7, 1982, the Florida District Court of Appeals, Fifth District, entered a per curiam affirmance of the trial court's judgment, (A/11).

After the judgment was rendered on January 26, 1981, the ban precluding Marashi's re-entry was lifted and Marashi returned to the United States to review the case and all the documents with his counsel. At that time, he presented several documents he had received from Forbes which indicated he was not liable for the damages. These documents also showed a justiciable issue.

Through counsel, Marashi filed a timely Motion for Relief from the Judgment based upon evidence not available at the time of trial, (A/25). In support of that Motion, Marashi filed his affidavit attaching the documents which showed that he was not liable to Forbes, (A/28). On June 17, 1982, a hearing was held at which the only evidence that was introduced was the affidavit of Marashi. Forbes did not respond to the motion and did not introduce any evidence. The documents introduced at the hearing were never before the court at the January 13, 1981 trial. On June 17, 1982, the trial court entered an order denying Marashi's motion for relief. Such order was appealed on July 16, 1982. Forbes filed a motion to dismiss the appeal of Marashi. In that motion, Forbes stated that the second appeal was the same as the first.

On August 26, 1982, the District Court of Appeals dismissed the appeal, (A/40).

On September 25, 1982, Marashi requested the Supreme Court of Florida to review the District Court's order under the Court's all writs power and the Court's responsibility to review the action of the lower Florida Courts. Marashi also filed an appeal. On September 30, 1982 the Florida Supreme Court denied to review the Petitioner's petition for review, (A/41). On October 5, 1982 the Florida Supreme Court dismissed Marashi's appeal. Marashi has brought this petition for certiorari in the Supreme Court of the United States.

HOW THE FEDERAL QUESTION WAS PRESENTED

As has previously been recited, Marashi has properly preserved his claim of a deprivation of a Federal Constitutional right, pursuant to state practice and has exhausted his ability to obtain

relief within the Florida judicial system, 28 USC § 1257(3), Central Union Co. v. Edwardsville, 269 U.S. 190, 70 L. Ed. 229, 46 S.Ct. 90 (1925). The first question of which Petitioner seeks review in this Court is the denial of Petitioner's right to due process of the law when the trial was conducted despite the fact the Petitioner, being outside the United States, was denied re-entry by the State Department and was the only witness. The denial of due process issue was inherently raised continuously throughout the proceedings in the trial court through counsel's repeated requests for a continuance and was specifically raised on appeal in Florida's appellate courts.

A constitutional issue, in Florida, may be properly raised if it is inherent in the issue before the Court, Buchman v. State Board of Accountancy, 262 So.2d 198 (Fla. 1962). In addition, this Court does

not require that particular words and phrases be used to raise a constitutional issue. It is only essential that the Petitioner bring the claim and the grounds therefor to the state court's attention with fair precision, New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928). In this case, the heart of Marashi's claim is that Marashi's presence was necessary to properly prepare and try the case. Such an issue was squarely before all the state courts.

In addition, the District Court of Appeal had to consider the federal constitutional issues presented. When the state court assumes that the federal question is properly before it and disposes of the issue, then the concern over the proper raising of the federal question has historically disappeared Whitney v. California, 274 U.S. 357, 71 L.Ed 1095, 47 S.Ct. 641 (1926)

Marashi obviated the due process claim in the motion for relief. Marashi argued that since he was in the United States, evidence which was previously unavailable and which was necessary to his defense became available and that he should be allowed to set aside the judgment and re-open the case. This motion was denied. The appeal of that denial was dismissed on the motion of Forbes that the second Appeal reiterated the first. Therefore, the federal claim of due process guaranteed to Marashi was raised in both appeals.

Lastly, the federal claim on Marashi's inability to be present was raised in the petition to the Supreme Court of Florida.

The second and third federal claim of Marashi was also properly raised. The second and third claim could only be raised at the appellate leve. This was done.

Even if the due process claims were not properly raised, this court has the power to review the state court proceedings. As will be seen in the next section, the denial of due process by the state trial court was an error that seriously affected the fairness, integrity and public reputation of the court proceedings. This court has the power to notice substantial denials of due process where the errors constitute a denial of fundamental fairness in the proceedings, Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). This court has recently recognized the fundamental unfairness in the justice afforded the Petitioner in its decisions in United States v. Valenzuela-Bernal, ___ U.S. ____, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982) and Lassiter v. Department of Social Services, ____ U.S. ____, 101 S.Ct. 2153, ____ L.Ed.2d ____ (1981).

Therefore, this Court has jurisdiction to review the federal questions presented in this petition in light of the federal constitutional deprivations properly preserved and brought to this court for review.

REASONS FOR GRANTING THE WRIT

1. The decision in the state court proceedings conflict in general principle with decisions of this Court on the interpretation of the due process clause of the 5th and 14th Amendments to the United States Constitution.

The basic notion of the due process clause of the 5th and 14th Amendments that no person shall be deprived of property without due process of law is applicable to aliens. Kwang Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953).

Due process in a civil case is a flexible concept. The requirements needed for the state to meet the due process requirements vary as the circumstances change. However, the basic right to due process entails fundamental fairness Adamson v. California, 332 US 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1948);

The basic requirements of procedural due process is that a person must be granted an opportunity to have a hearing at a meaningful time and in a meaningful manner. Armstrong v. Mango, 380 US 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965).

Generally, this court has held that due process requires the consideration of three factors: First, the nature and extent of the private interest that will be effected; second, the risk of an erroneous decision; and third, the governments' interest, Mathews v. Eldridge, 424 US 319 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

In a civil trial, this Court has held that a person has the right to be present at every stage of the trial, Fillippon v. Alion Vein State Co., 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed 853 (1919). In essence a party has the fundamental right to confront and cross-examine witnesses and to present evidence on his behalf. These rights do not rest solely with a criminal defendant, Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843,____ L.Ed. 2d _____, (1969).

From the above cases, there is no question that the trial judge cannot prevent a party from being present, from presenting evidence and crossexamining witnesses. In the case of Marashi, the trial judge did not expressly rule that Maraghi cannot exercise his rights. However, he did rule that the trial must proceed and denied the request of counsel for Marashi for a continuance.

The effect of such a ruling is the same as if the trial judge ruled that Marashi could not be present, present evidence and cross examine. Marashi was outside the United States during the state court trial proceedings. At the time of the state court proceedings, the United States was involved in an international crisis where Americans were imprisoned by Iran. In retaliation, the United States restricted the immigration of Iranian citizens into the United States. Marashi, an Iranian, could not re-enter the United States. This was placed before the trial judge several times by counsel for Marashi. The trial judge knew that Marashi was unable to attend though no fault of his own. It is true that the rights enumerated above can be waived; however, such a waiver cannot be imposed on Marashi when he is unable to exercise his right due to a situation beyond his control. An act

which has the effect of depriving a person of due process is just as unconstitutional as an act that directly deprives the person of due process.

The trial court recognized the problem associated with Marashi's absence. However, the trial court felt that Marashi could effectively be present through counsel and present his evidence by deposition. To meet the requirements of due process, the opportunity for a hearing must be granted in a meaningful manner, Armstrong v. Manzo, supra. Marashi could not present his case through counsel. He was the only one who had knowledge of the transaction. He was outside the United States and his papers were inside. He could not adequately prepare for trial until he had reviewed all the documents. In addition, no one knew what documents were important and which documents were not, or even where these documents were.

Only Marashi could piece together the transaction after he had an opportunity to review all the documents. Once Marashi returned, he was able to prepare for trial.

Marashi was denied the right to confront the witness and cross-examine the witnesses at trial. Since he was the only one who knew the facts, subtle meanings of testimony could be missed by counsel. Marashi in his defense could not counter the statement of the witness at trial and present a complete and accurate picture of what occurred. Marashi under the trial court's view could be stuck only with the deposition to prove his case. Meanwhile, Forbes would have time to review any testimony of Marashi and counter Marashi's statements without fear of contradiction. In effect, the trial court was forcing Marashi to present his case first and at a significant time prior to the presentation

of Forbes case, and without the right to rebut any testimony of Forbes. Such an effect does not meet with the fundamental fairness expected of traditional American justice.

This court has been sensitive in the recent past to these problems in providing a person the opportunity to a meaningful hearing. The trend has been to review carefully the effect of the procedure used for a hearing, see for example, Landon v. Plasencia, 51 L.W. 4001 (Nov. 15, 1482) and United States v. Valenzuela - Bernal, ___ U.S. _____, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982).

The denial of due process of Marashi was heightened by the lack of prejudice on the part of Forbes. The case was only 6 months old at the time of trial, the hostage situation was only a few days from resolution, Marashi would return soon and was willing to go to trial, and Forbes

could collect if he won the case from the bond that Marashi had posted. Prompt efficient procedures is a proper state interest. However, this Court has stated that the Constitution recognizes higher values than speed and efficiency. The due process clause was designed to protect the fragile values of a vulnerable citizen from an overbearing concern for efficiency that may result from state official, Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). This is particularly true in Marashi's case where Marashi presented a meritorious defense in the motion for relief that was not countered by Forbes. The due process clause was to prevent a result where the speed of the trial prevented Marashi from presenting his defense. The speed of the trial led the judge to decide to award attorneys fees based on the fact that Marashi did not have any meritorious

defense, that Marashi's defense was frivolious and a sham.

Therefore, the Florida District Court of Appeal and the decisions affirming the trial court's ruling deprives Marashi of his guaranteed right to due process and conflicts in principle with the decision of this Court. Such a conflict is reviewable, Ivan Allen Co. v. United States, 422 U.S. 617.

2. The decisions below raise significant and important problems concerning the fairness, intergrity and public reputation of public proceedings.

The right to due process is a fundamental right guaranteed to all persons of the United States. As such a deprivation of the right is an important consideration. The importance of this case is heightened because of the number of aliens who are residents of the United States and the present turmoil in many

countries. Public opinion, emotion and tremendous pressures from a shift in political situations in foreign countries makes it likely that situations similar to Marashi's will occur again. Aliens in these situations must be afforded a fair trial. Marashi recognizes the principle that this court is not constituted only to correct the errors of a lower court. However, this court has stated that it has a constitutional mission to correct gross miscarriages of justice, especially when fundamental constitutional questions are presented, Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed2d 654, 80 S.Ct. 624 (1960), Montana v. Kennedy, 366 U.S. 308, 6 L.Ed2d 313, 81 S.Ct. 1336 (1961).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments of the Florida District Court of Appeals, Fifth District.

Respectfully submitted,

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January 3, 1983

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NO. _____

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v.

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APPENDIX

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January 3, 1983

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IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NO. CI 81-6619

FORBES FURNITURE CO.,

Plaintiff,

vs.

MOHAMMAD H. MARASHI,

Defendant.
_____/

ALTERNATIVE MOTION TO CONTINUE HEARING ON MOTION FOR SUMMARY JUDGMENT

Defendant, by his attorney, moves this court to continue the hearing on Plaintiff's Motion for Summary Judgment, and would show as grounds therefore, the following:

1. Rule 1.510, F. R. Civ. Pro. provides that the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had if it appears from the affidavits of a

party opposing the Motion for Summary Judgment that he cannot present by affidavit facts essential to justify his opposition.

2. In this case, the Defendant is not an American citizen, does not reside in the United States, and is currently prohibited from entering the United States by current immigration laws.

3. The Defendant currently resides in Switzerland.

4. The Defendant cannot speak English.

5. The Defendant is desirous of defending the allegations made in the Complaint and Amended Complaint; and is further desirous of prosecuting his counterclaim against the Plaintiff.

6. It is necessary to obtain affidavits from the Defendant and prospective witnesses who are all residing in the country of Switzerland.

7. Defendant has posted a bond which

is in an amount in excess of the amount claimed as being due and payable in the Amended Complaint.

8. The international mail system through which affidavits may be sent requires approximately 14 days for delivery of mail each way.

9. Defendant requests a continuance of the hearing on Plaintiff's Motion for Summary Judgment for a period of at least 60 days to allow for the obtaining of sworn affidavits in opposition to Plaintiff's Motion for Summary Judgment and/or the taking of Defendant's deposition in Switzerland.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished, by mail, to David M. Landis, Attorney for Plaintiff, Suite 615, Bradshaw Building, 14 E. Washington Street, Orlando, Florida 32801, this 3rd day of October, 1980.

/s/

THOMAS V. INFANTINO
Post Office Drawer B
Winter Park, Florida 32790
Attorney for Defendant

(305) 644-4673

EXCERPTS FROM TRANSCRIPT OF
HEARING HELD JANUARY 13, 1981

MR. MEER: I mean, do you want to conclude what you were --

MR. LANDIS: Well, no. You go ahead, okay, because I'm going to make some motions too in a minute here.

MR. MEER: Okay. Your Honor, excuse me if my voice is a little off today.

For the record, I'd like to make a motion for continuance for the trial based on some rather extraordinary circumstances, and that is that the Defendant, the gentleman being sued, is in Geneva, Switzerland, and can't get back in the country to defend himself. He was served here. He was served in the United States. He had to leave and when he found himself unable to come back and defend himself because of the political situation between this country and Iran.

We tried to get him in, in that we even went so far as to obtain an attorney

specializing in immigration law named Jeffrey Bernstein from Miami, and he said that -- we tried argumentary grounds in that the gentleman was being sued, and the lawyer said humanitary grounds extend to dying of cancer, and that's about it. There were no other grounds.

We think the Court has discretion under the civil rules of 1.460 to postpone the trial until the Defendant can obtain a visa to get in this Country. The cases I found on point really deal with unavailability of a witness rather than unavailability of a party to the action. So, I can't give you a precise case on point. But I think we do have a good cause because as late as last weekend we thought that the gentleman's wife who has direct knowledge of the action could fly in on a British passport because she was born in England. I found that not to be the case.

So, we'd like to make a motion for

the record.

THE COURT: I'll deny it. We've talked about this before. I'm sure there's provisions. You could have had his testimony taken over there if you really needed it. Besides, there is no assurance that he'll ever get back in this Country. So, we can't keep the trial open forever. So, we'll go ahead and proceed.

MR. MEER: If I promise not to file a motion for lack of prosecution?

THE COURT: All right. Mr. Landis.

MR. LANDIS: Your Honor, we believe we're entitled to attorneys' fees in this case based on two factors. Number one, the invoice which is attached to the complaint as part of the composite exhibit contains an attorneys' fee provision. That's

IN THE CIRCUIT COURT
OF ORANGE COUNTY,
FLORIDA

CIVIL NO. 80-6619

FORBES FURNITURE COMPANY,
a Florida corporation d/b/a
FURNITURE SHOWCASE,

Plaintiff,

vs.

MOHAMMAD H. MARASHI,

Defendant.
_____/

FINAL JUDGMENT

This action was tried before the Court. On the evidence that was presented and upon consideration,

IT IS ADJUDGED:

1. Plaintiff shall recover from Defendant, MOHAMMAD H. MARASHI, the sum of $24,723.23 as payment due Plaintiff by Defendant, plus interest in the amount of $917.70, plus costs in the amount of $354.62, plus attorney's fees in the

amount of $7,000.00, said amounts totaling $32,995.55 for which let execution issue.

2. The surety, Peerless Insurance Company, pursuant to Release of Attachment Bond, is holding the sum of $30,341.54 for purposes of assisting in payment of any judgment entered herein against Defendant. Therefore, in accordance with Florida Statutes §76.31, the Plaintiff shall have and recover from Peerless Insurance Company the sum of $30,341.54 for which let execution issue.

3. The value of the property retaken by Defendant under the above referenced bond is in excess of $25,000.00 and is the sum set forth in Exhibit "I" to the Order for Writ of Attachment dated June 27, 1980.

4. Plaintiff is lawfully entitled, pursuant to Florida Statutes §78.19, to the return of three (3) Picks Bar Stools, value of which according to Plaintiff is approximately $750.00, and Defendant shall

make such property available to the Plaintiff and voluntarily surrender possession of same.

DONE AND ORDERED at Orlando, Florida on the 26th day of January, 1981.

/s/ MAURICE M. PAUL
CIRCUIT Judge

Copies to:
David M. Landis, Esq., 605 E. Robinson St., Orlando, Florida 32801
Kenneth M. Meer, Esq., P. O. Drawer B, Winter Park, Florida 32790
Peerless Insurance Company, c/o Way, Sanderson & Jones, 611 N. Magnolia, Orlando, Florida

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT

MOHAMMAD H. MARASHI,

Appellant,

v.

FORBES FURNITURE COMPANY, a Florida corporation, d/b/a FURNITURE SHOWCASE,

Appellee.

_____/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 81-269

Decision filed April 7, 1982

Appeal from the Circuit Court
for Orange County,
Maurice M. Paul, Judge.

Thomas F. Lang of
Swann and Haddock, P.A.,
Orlando, for Appellant.

David M. Landis of
Clayton & Landis,
Orlando, for Appellee.

PER CURIAM.

AFFIRMED.

ORFINGER, UPCHURCH, F., and COWART, JJ.,
concur.

A F F I D A V I T

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

BEFORE ME, the undersigned authority duly authorized to administer oaths and acknowledgments, personally appeared JEFFREY A. BERNSTEIN, who after being cautioned and sworn, under oath deposes and states:

1. I have personal knowledge of the facts herein stated.

2. I have been licensed to practice law in the state of Florida since 1974.

3. I am a bonafide member of the Association of Immigration and Nationality Lawyers, national chapter and South Florida chapter. I am the treasurer of the South Florida chapter.

4. I have designated immigration and naturalization law as an area of specialty in Florida.

5. I was retained by Mohammad Hoosein Marashi to handle his immigration matters in the United States.

6. The proper applications were filed to obtain permission for Mr. Marashi to remain in the United States to conduct business. However, while the application was pending the "hostage" situation developed in Iran, and the government of the United States developed certain restrictive policies toward Iranians in the United States and Iranians who intended to enter the United States. Based on the foregoing, Mr. Marashi's application was denied by letter dated October 9, 1980. A copy of that letter is attached. The application was denied pursuant to national policy instructions relating to Iranian nationals dated April 12, 1980.

7. The central office of the Immigration and Naturalization Service, telephonic memorandum, entitled Recision

of Deferred Voluntary Departure Date, dated November 13, 1979, revoked permission of all Iranians to remain in the United States until June 1, 1980, under the so-called temporary sanctuary program. That program had allowed those persons expressing an unwillingness to return to Iran because of unsettled conditions to stay here. By executive order number 12172, entitled Delegation of Authority with Respect to Entry of Certain Aliens into the United States, dated November 26, 1979, the Attorney General and the Secretary of State of the United States were authorized to prescribe limitations and exceptions on rules and regulations governing Iranians holding nonimmigrant visas. A final rule was published by the government at 45 Federal Register, Page 70, dated April 9, 1980 (22 C.F.R., Section 46.8) invalidating all immigrant and nonimmigrant visas of Iranian nationals issued prior to April 7,

1980, unless such visa had been presented to consular officers on or after April 7, 1980, for endorsement. By Notice No. 710 entitled Revocation of Certain Nonimmigrant Visas, the Department of State revoked all nonimmigrant visas issued to Iranian nationals. This was dated April 9, 1980.

8. On April 16, 1980, a final rule was published at 8 C.F.R., Section 214.1(c), entitled Nonimmigrant Requirements for Admission, Extension and Maintenance of Status. That rule permitted the extension of nonimmigrant stay of an Iranian national only if the alien was in immediate need of medical treatment which was available only in the United States or unless he or she had a relationship to a United States citizen or local permanent resident within the statutorily defined immediate relative or familial preference classification.

9. Based on my personal knowledge

and belief, Mr. Marashi did not attend his trial for reasons beyond his control.

FURTHER AFFIANT SAYETH NOT.

/s/
JEFFREY A. BERNSTEIN

SWORN TO AND SUBSCRIBED BEFORE ME this 28th day of April, 1981.

/s/
Notary Public, State of Florida

My commission expires:

TO: ALL I&NS REGIONAL OFFICES
ALL I&NS DISTRICT OFFICES
ALL I&NS FILES CONTROL OFFICES
ALL I&NS BORDER PATROL SECTOR HEADQUARTERS

BT

PRIORITY....IRANIAN PROJECT NR. 58...
In view of current Iranian situation, Applications for extension of stay of nonimmigrant status or adjustment of status to permanent residence submitted by Iranian nationals who, even though otherwise eligible, may only be granted if one or more of the criteria set forth below are met.

1. For compelling humanitarian reason based on a fear of prosecution because of ethnic origin, religious or political beliefs. In such case, the applicant must file a request for asylum.

2. A close familial relationship as set forth in section 201(B) and 203(A)(1),(2),(4) and (5) of the act.

3. For compelling humanitarian reasons, there is an immediate need for medical attention. Since the fees are for the filing, if it is obvious than an Iranian national does not appear to meet above criteria he/she shoul be advised of the likelihood that there application will be denied and frse will not be refunded. If they insist on filing, the application will be processed in accordance with these instructions. If they do not file an application, service employees will obtain their present address and departure plans to assist service in locating such aliens if they fail to make timely departure. Such information shall be immediately referred to investigations. Before denying a pending application, the applicant should be given an opportunity to make immediate representation or submit evidence that he/she meets the above criteria. Denied

applications will immediately be referred to investigations for issuance of an order to show cause. The above criteria do not apply to applications filed under Section 248. A change of nonimmigrant status under section 248 may not be granted to any Iranian national except a request to change to a status under section 101(A)(15)(G). All applicants by Iranian nationals for G status will be forwarded with file to COEXM-HFK before any adjudicative action is taken. Fdenied applications will immediately be referred to investigations for issuance of order to show cause. These instructions pertain to all presently pending cases and those filed subsequent to this instruction. All Iranian applications are to be processed immediately. Reapeat immediately.

BT (misc. scribble)

NNNN
002 10:34:22 04/12/80

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
155 South Miami Avenue (Third Floor)
Miami, Florida 33130

Refer to File No.
A24 685 046

Mohammad Hossein MARASHI
800 Interlachen Avenue
Winter Park, Florida 32789

Date:
October 09 1980

DECISION

Upon consideration, it is ordered that your APPLICATION FOR CHANGE OF NON-IMMIGRANT STATUS be denied for the following reasons:

Your application is denied pursuant to National Policy Instructions relating to Iranian Nationals dated April 12, 1980. The Attorney General, in accordance with the President's initiative, has determined not to exercise his authority favorably in behalf of Iranian applicants except for a change of nonimmigrant status under Section 101(a)(15)(G).

In view of the foregoing, your application

is hereby denied.

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice, (18 days if this notice was received by mail). If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

Board of Immigration Appeals in Washington, D.C., on the enclosed Forms 1-290 A. (A fee of $50.00 is required).

X - Regional Commissioner on the enclosed Form 1-290 B. (A fee of $50.00 is required).

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the

address shown in the heading of this letter.

Sincerely yours,

District Director

Enclosure(s)

Form 1.292

EXCERPTS OF MARASHI APPEAL BRIEF TO FLORIDA 5TH DISTRICT COURT OF APPEAL

ARGUMENT

V

THE APPELLANT HAS BEEN DENIED DUE PROCESS OF THE LAW

The 5th and 14th Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution guarantee the Appellant due process of the law even though he is an alien. Kwong Hai Chew v. Colding, 344 US 590, 73 S. Ct 472, 97 L.3d 576 (1953); Hines v. Davidowitz 312 US 52, 61 S Ct 399, 85 L. Ed 581 (1941); Graham v. Richardson, Sailer v. Leger, 403 US 365, 91 S. Ct. 1848, 29 L. Ed 2d 534 (1971) (Companion Cases).

Due Process of Law requires that the Defendant be afforded the essential requirements of law and fundamental

fairness. As

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA.

CASE NO. 80-6619

FORBES FURNITURE COMPANY,
a Florida corporation d/b/a
FURNITURE SHOWCASE,

Plaintiff,

vs.

MOHAMMAD H. MARASHI,

Defendant.
_____/

MOTION FOR RELIEF FROM JUDGMENT

COMES NOW Defendant MOHAMMAD H. MARASHI, by and through his undersigned attorney, and moves the Court pursuant to Florida Rule of Civil Procedure 1.540(b) for relief from the Final Judgment entered in this cause on January 26, 1981, and Defendant further says:

1. At the time of trial of this cause the Defendant was in Switzerland and was refused permission to re-enter the United States.

2. As a result of Defendant's inability to re-enter the United States to counsel with his attorney and to appear for trial, the Defendant was unable to present evidence despite due diligence to do so, and was further unable to discern and to counteract any misrepresentation to the Court by the Plaintiff.

3. Defendant has since been able to return to the United States, has reviewed the transcript of the trial proceedings and other testimony in this cause, and has executed and filed an Affidavit stating specific instances of misrepresentation by witnesses for the Plaintiff, and has stated evidence which was previously unavailable.

WHEREFORE, Defendant moves the Court to relieve Defendant MOHAMMAD H. MARASHI from the Final Judgment entered in this cause on January 26, 1981, and

for return of any sums or property which have already been provided to Plaintiff under the terms of said Final Judgment.

I hereby certify that a true copy hereof has been furnished this 30th day of October, 1981, to David M. Landis, Esquire, Suite 650, Two West Central Blvd., Orlando, Florida 32801; Kenneth M. Meer, Esquire, Post Office Drawer B, Winter Park, Florida, 32790 and William L. Whitacre, Esquire, 170 East Washington Street, Orlando, Florida, 32801, for Peerles Insurance Company.

THOMAS F. LANG
Post Office Box 7838
Orlando, Florida 32854
(305) 628-3939
Attorneys for Defendant
Marshi

IN THE CIRCUIT COURT,
IN AND FOR ORANGE
COUNTY, FLORIDA

CASE NO: CI 80-6619

FORBES FURNITURE COMPANY, a
Florida corporation, d/b/a
FURNITURE SHOWCASE,

Plaintiffs,

vs.

MOHAMMAD H. MARASHI,

Defendant.
_____/

A F F I D A V I T

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared MOHAMMAD H. MARASHI, who, after being duly sworn according to law, deposes and says as follows:

1. I am the Defendant in the above-styled cause of action and therefore make this Affidavit of my own personal knowledge.

2. On January 13, 1981, I was

in Switzerland and I had been refused permission to re-enter the United States by U.S. Department of state because of the political situation in Iran and my relationship with the Shah of Iran.

3. As a result of my not being able to re-enter the United States, I was unable to appear and testify at the Trial of this matter on January 13, 1981. I was also unable to counsel with my attorney in order to properly prepare for the January 13, 1981, Trial.

4. Subsequent to January 13, 1981, I was given permission to re-enter the United States, and, in fact, I have returned to the United States.

5. Upon my return, I received the transcript of the January 13, 1981, proceedings as well as the depositions of MARVIN WISEMAN, JANICE ANDRESS and INGRID WISE.

6. After reviewing the above

documents, I have reason to allege that certain evidence was not presented to the Court because of my inability to appear at, and prepare for, the Trial and that certain matters were misrepresented to the Court and, in fact, the Court was presented with fradulent evidence.

7. There are numerous inconsistencies and misrepresentations in the deposition of Ingrid Wise. For instance, no one was ever requested to obtain a piano teacher.

8. Additionally, any debt owed the Plaintiff has been satisfied by the Defendant.

9. The first bill rendered to me by FURNITURE SHOWCASE was presented on February 19, 1980, after numerous requests. After this bill was submitted, I had a meeting with Mr. Wiseman and Ingrid Wise to reconcile the bill. At that time Mr. Wiseman agreed that the

piano, two mirrors and the screen were to be returned for credit against their respective invoices. Based upon this agreement and reconciliation, check #187 was remitted in the amount of $3199.00. Subsequesntly, I ordered the furnishings listed on Invoice Number 23172.

10. Check #187, a copy of which is attached hereto, was completed by Ingrid Wise at the time that the February 19, 1980, Agreement was executed. Such check was remitted with the understanding that all purchases made prior to this date here now paid for.

11. The document attached hereto as Exhibit "A" reflects a signed agreement between the parties to this suit showing the balance owed as of February 19, 1980, as being "0". This document shows no charge on Invoice #22025 which is the invoice listing the piano. The

reason for entry is that Mr. Wiseman agreed, on or about February 19, 1980, to pick up such piano and to credit my account for the full amount of the piano. Mr. Wiseman failed to have such piano picked up.

12. After February 19, 1980, Mr. Wiseman picked up numerous items and when asked why he wasn't taking the piano, he replied that it had to be picked up by different people from a different store. As to the black screen, he stated he wanted to take it to the store on Highway 436.

13. Exhibit "A" also reflects credit to be given for the return of the black screen (Invoice #22021) and for the return of two mirrors and a night stand (Invoice #22024).

14. On or about February 19, 1980, I paid FURNITURE SHOWCASE the agreed upon $3199.00 pursuant to Exhibit "A".

This payment is reflected on Exhibit "B" which is a copy of the ledger sheet maintained by Plaintiff. At the time that Exhibit "B" was presented, Mr. Wiseman told me that his bookkeeper had made a mistake by including the piano and the screen.

15. On or about June 11, 1980, Mr. Wiseman and I again discussed both the Apopka and Winter Park accounts. The figures shown in the 4th and 5th coulmns opposite Payments and Balance Due were entered by Mr. Wiseman and reflect credits for the piano and screen. At that time, we had a disagreement over whether I owed an additional $6201.00 for the Apopka furniture. There was no dispute over whether the piano and screen could be returned. At this time, I also informed Mr. Wiseman that I was going to have to leave the country.

16. On June 11, 1980, Mr. Wiseman

and I entered the Agreement attached hereto as Exhibit "C" to close the Winter Park account.

17. At all times, it was my understanding that I could return any furniture or furnishings purchased from or through FURNITURE SHOWCASE which were not acceptable to me.

18. At no time did Mr. Wiseman or any representative of FURNITURE SHOWCASE ever indicate to me that I could not return the screen or piano in question and, in fact, on more than one occassion Mr. Wiseman specifically agreed to allow me to return the piano and screen for complete credit.

19. The return of these items would be consistent with our agreement and with our prior dealings. The documents attached hereto as Composite Exhibit "D" reflect numerous items which were returned for credit from the

Winter Park home. A comparison of Invoice # 1933 with the cover statement of account will reflect returns and errors in billing. A comparison of the invoices attached with the statements will show numerous other returns and adjustments.

20. The documents attached as Composite Exhibit "E" reflect certain of the returns made from the Apopka home.

21. The document attached as Exhibit "F" was affixed to a piece of furniture delivered to my residence. I was billed $489.00 rather than $392.00 for this item.

22. Exhibit "G" is a reconciliation prepared by me with regard to the items delivered to Apopka. At the time this document was prepared, the only dispute known to me which existed between myself and Mr. Wiseman concerned the T.V. and bedroom set (dressers and temporary bed) shown on Exhibit "G".

23. Mr. Wiseman has misrepresented to the Court the balance owed by myself to FURNITURE SHOWCASE. Mr. Wiseman has misrepresented to the Court the fact that there was no agreement reconciling my Apopka account and had misrepresented to the Court the facts surrounding the return of the piano and screen. Mr. Wiseman was informed in a timely manner that both the piano and screen were to be returned and he, in fact, agreed to their return.

24. Attached as Exhibit "H" are copies of certain checks remitted to FURNITURE SHOWCASE.

25. All documents attached hereto are true and accurate copies of original documents that are or were in the possession of either the Plaintiff or the Defendant.

FURTHER AFFIANT SAYETH NAUGHT.

MOHAMMAD H. MARASHI

Sworn to and subscribed
before me this 27th
day of August, 1981.

NOTARY PUBLIC,
State of Florida
My Commission Expires: September 6, 1983

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been furnished this 30th day of October, 1981, to David M. Landis, Esquire, Suite 650, Two West Central Blvd., Orlando, Florida, 32801; Kenneth M. Meer, Esquire, Post Office Drawer B, Winter Park, Florida 32790; and William L. Whitacre, Esquire, 170 East Washington Street, Orlando, Florida 32801, for Peerless Insurance Company.

THOMAS F. LANG
Swann and Haddock, P.A.
Post Office Box 7838
Orlando, Florida 32854
(305) 628-3939
Attorneys for Defendant
Marashi

IN THE CIRCUIT COURT OF
ORANGE COUNTY, FLORIDA

CIVIL NO. 80-6619

FORBES FURNITURE COMPANY,
a Florida corporation d/b/a
FURNITURE SHOWCASE,

Plaintiff,

vs.

MOHAMMAD H. MARASHI,

Defendant.

ORDER

After due notice by or to all parties affected, a hearing was held before the court with respect to all matters disposed of by this order.

Upon consideration is it ORDERED that:

Motion for Relief from Judgment is DENIED.

DONE AND ORDERED in chambers at Orlando, Florida this 17th day of June, 1982.

Orlando, Florida

/s/ Maurice M. Paul
Judge

Copies:

Donald E. Grincewicz, Esq., Two W. Central Blvd., Orlando, Fla., 32801
Kenneth M. Meer, Esq., P. O. Drawer B, Winter Park, Fla., 32790
William L. Whitacre, Esq., 170 E. Washington St., Orlando, Fla., 32801
Thomas F. Lang, Esq., P. O. Box 7838, Orlando, Fla., 32854

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

MOHAMMAD H. MARASHI

_____,

Appellant, CASE NO. 82-985

v.

FORBES FURNITURE COMPANY,

etc. _____,

Appellee.

_____/

DATE: August 26, 1982

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION TO DISMISS APPEAL, filed August 9, 1982, is granted and the above-styled appeal is hereby dismissed.

I hereby certify the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

By: /s/ Rowland W Holiday
Deputy Clerk

(COURT SEAL)

cc: Donald E. Grincewicz, Esquire
Paul H. Bowen, Esquire

IN THE SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 30, 1982

MOHAMMAD H. MARASHI,	**	
Petitioner,	**	
vs.	**	CASE NO. 62,671
FORBES FURNITURE COMPANY, a Florida corporation, d/b/a FURNITURE SHOWCASE,	**	
	**	
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. St. Paul Title Insurance Corporation v. Davis, 392 So.2d 1304 (Fla. 1980).

A True Copy

TEST:

/s/
Sid J. White
Clerk Supreme Court

cc: Paul H. Bowen, Esquire
Donald E. Grincewicz, Esquire of Lawrence, Griffin & Landis

IN THE SUPREME COURT OF FLORIDA
TUESDAY, OCTOBER 5, 1982

MOHAMMAD H. MARASHI,	**	
Petitioner,	**	
vs.	**	CASE NO. 62,686
FORBES FURNITURE COMPANY, a Florida corporation d/b/a FURNITURE SHOWCASE,	**	District Court of Appeal, 5th District
	**	No. 82-985
	**	
Respondent.	**	

It appearing to the Court that it is withour jurisdiction, the Petition for Review is hereby dismissed. Pena v. Tampa Federal Savings and Loan Assn., 385 So.2d 1370 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Frank J. Habershaw, Clerk
Hon. William D. Gorman, Clerk
Hon. Maurice M. Paul, Judge

Paul H. Bowen, Esquire
of Swann & Haddock
Donald E. Grincewicz, Esquire

Office-Supreme Court, U.S.
FILED
MAR 1 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1193

MOHAMMAD H. MARASHI, Petitioner

-v-

FORBES FURNITURE COMPANY and
PEERLESS INSURANCE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Fifth District

BRIEF FOR RESPONDENT, FORBES FURNITURE COMPANY, IN OPPOSITION TO THE PETITION FOR CERTIORARI

Harry W. Lawrence, Esq.
Lawrence, Griffin & Landis
Suite 650
Two West Central Boulevard
Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

Donald E. Grincewicz, Esq.
David M. Landis, Esq.
Lawrence, Griffin & Landis
Suite 650
Two West Central Boulevard
Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

February 28, 1983

QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States has jurisdiction to review the Petition for Certiorari filed by Petitioner.

a. Whether Petitioner timely filed his Petition for Certiorari to review Orders dated April 7, 1982, and August 26, 1982.

b. Whether the Court has jurisdiction to review Orders dated April 7, 1982, and August 26, 1982, coming from a Court which is not the highest Court in the State of Florida.

c. Whether Petitioner has carried his burden to show that the State Court decided this case without any independent or adequate State grounds.

d. Whether the questions raised by Petitioner are so substantial as to support jurisdiction from the State Court.

e. Whether the Florida Supreme Court correctly concluded on October 5, 1982, that it was without jurisdiction and dismissed Petitioner's appeal and specifically precluded Petitioner from attempting to move the matter for rehearing.

2. Whether Petitioner has been denied due process of the law.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1193

MOHAMMAD H. MARASHI, Petitioner

-v-

FORBES FURNITURE COMPANY and
PEERLESS INSURANCE COMPANY,
Respondents.

On Petition for Writ of Certiorari to
the Florida District Court of Appeal,
Fifth District

BRIEF FOR RESPONDENT, FORBES FURNITURE COMPANY, IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent, FORBES FURNITURE COMPANY, hereinafter referred to as "Respondent", respectfully prays that the Court dismiss the Petition for Writ of Certiorari, filed by Petitioner MOHAMMAD H. MARASHI, hereinafter referred to as "Petitioner", render summary affirmance or deny the Petition for Writ of Certiorari based on the hereinafter stated grounds.

OPINION BELOW

Petitioner asserts that he is seeking review of Orders of the Florida District Court of Appeal, Fifth District, dated April 7, 1982, and August 26, 1982. Petitioner does not seek review of the Order of the Supreme Court of Florida dated October 5, 1982.

In the Order dated April 7, 1982, the Florida District Court of Appeal, Fifth District, entered a per curium decision, without opinion. In the Order dated August 26, 1982, the Florida District Court of Appeal, Fifth District, dismissed without opinion Petitioner's attempt to appeal an order of the Trial Court denying Petitioner's Motion for Rehearing.

In the Order dated September 30, 1982, the Florida Supreme Court dismissed without opinion Petitioner's Petition for Review of the Order of The Florida District Court of Appeal, Fifth District, dated August 26, 1982. In the Order dated

October 5, 1982, the Supreme Court of Florida dismissed without opinion Petitioner's Petition for Review of the Order of August 26, 1982, and specifically precluded Petitioner from filing a Motion for Rehearing. Copies of all orders mentioned herein appear in the Appendix.

JURISDICTION

Petitioner does not meet the standards of 28 U.S.C. §1257(3), the statute upon which he attempts to invoke the basis of this Court's jurisdiction.

First, Petitioner is not seeking review of a Final Judgment or decree of the highest Court in the State. Instead, Petitioner ignores the Order of the Florida Supreme Court, dated October 5, 1982, and requests review of the two Orders, dated April 7, 1982, and August 26, 1982, of the Florida District Court of Appeal, Fifth District, the Court one level below the Florida Supreme Court.

Second, the grounds enumerated in 28 U.S.C. §1257(3), were not specially set up or claimed during the trial proceedings. Petitioner only requested a continuance and did not specially set up or claim any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States of America.

In seeking review of the Orders of the Florida District Court of Appeal, Fifth District, dated April 7, 1982, and August 26, 1982, Petitioner does not comply with the provisions of 28 U.S.C. §2101(c).

Petitioner, in his brief at Page 2, under the heading "Jurisdiction", states that, "The Florida Supreme Court dismissed Petitioner's timely Appeal on October 5, 1982, and this Petition was filed within 90 days of that date." On Pages 1 and 23 of his Brief, Petitioner requests that the Court review the Orders of the Florida District Court of Appeal, Fifth District,

dated April 7, 1982, and August 26, 1982. Petitioner does not seek review of the Order dated October 5, 1982, entered by the Florida Supreme Court. Pursuant to 28 U.S.C. §2101(c), Petitioner's application for review of the Orders dated April 7, 1982, and August 26, 1982, is not timely and should be dismissed.

Petitioner has filed three (3) appeals in this case, not including this one. All of the aforementioned appeals filed by Petitioner resulted in the Appellate Courts denying Petitioner the relief requested without opinion. Thus, all of the State Court litigation was disposed of without any opinion to indicate whether any federal grounds were chosen by the State Court. Consequently, the burden falls upon Petitioner to establish that there was no independent and adequate state grounds. As previously indicated herein, the record clearly shows that the decision of the Trial Court was entirely

based on independent and adequate state grounds. For these reasons, this Court should dismiss this case. See: Allen v. Arguimbau, 198 U.S. 149, 25 S. Ct. 622 (1905); Durley v. Mayo, 351 U.S. 277, 76 S. Ct. 806 (1956); and Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 11 S. Ct. 528 (1891).

Further, it is clear that the Order of the Florida Supreme Court was also grounded on independent and adequate state grounds. The Florida Supreme Court dismissed Petitioner's Appeal with an Order dated September 30, 1982, relying on St. Paul Title Insurance Corp v. Davis, 392 So.2d 1304 (Fla. 1980), which followed Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Jenkins, supra, the Florida Supreme Court dismissed an appeal on the basis that it lacked jurisdiction to review the Florida District Court of Appeal's decision, which read in its entirety, "Per Curium Affirmed", even though the

decision of the District Court was accompanied by a dissenting opinion. The Florida Supreme Court stated that it lacked jurisdiction to review per curium decisions of the several District Courts of Appeal of the State rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion.

The Florida Supreme Court entered another Order on October 5, 1982, dismissing Petitioner's Appeal without leave for Petitioner to move for rehearing. The Court relied on Pena v. Tampa Federal Savings & Loan Assoc., 385 So.2d 1370 (Fla. 1980). As in St. Paul, supra, the Court in Pena followed Jenkins, supra.

In addition to the fact that the State Courts decided the case entirely on independent and adequate state grounds, the questions raised by Petitioner are not so substanital as to support jurisdiction from the State Court. Considered in its

most favorable light, all of the questions presented by Petitioner could have been resolved, had Petitioner availed himself of the provisions contained in Fla. R. Civ. P. 1.330(a)(3), which would have permitted Petitioner to have his deposition taken for use at trial. The record does not raise a bona fide, substantial Federal question.

The substantial question doctrine relates to questions arising on writs of error from State Courts where, aside from the Federal status of the parties to the action or the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a bona fide Federal question. In that class of cases, this Court not only may, but it is its duty to, determine whether in truth and in fact a real Federal question arises on the record. Swafford v. Templeton, 185

U.S. 487, 22 S. Ct. 783 (1902). The questions raised by Petitioner within his Brief are not substantial Federal questions and do not meet this test.

Since the Federal questions raised in the Petition by Petitioner were not raised in nor were they discussed by the State Courts, it would be assumed that they had not been properly presented. Fuller v. State of Oregon, 417 U.S. 40, 95 S. Ct. 2116 (1974). Therefore, based on all of the grounds cited herein, the United States Supreme Court does not have jurisdiction and should dismiss the Petition for Writ of Certiorari filed by Petitioner, or enter Order of Summary Affirmance or deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of this Case and of the Facts, presented by Petitioner, in many respects is misleading and erroneous. Respondent shall, therefore, present a brief Statement of the Case and of the Facts to aid the Court in understanding what has transpired. This Statement serves to expand and illuminate those instances that Petitioner chose to ignore or not detail.

On October 3, 1980, Petitioner's Affidavit in Opposition to Respondent's Summary Judgment was stricken from the record because it had not been signed by Petitioner as stated, but was signed by Petitioner's son.

On October 10, 1980, Petitioner then filed an Amended Affidavit in Opposition signed by one of his sons as his attorney-in-fact. Petitioner's second Motion for Continuance was denied on October 15, 1980, because Petitioner mistakenly thought the case was not at issue.

Petitioner erroneously believed that Respondent's Amendment to Complaint was an Amended Complaint.

On October 17, 1980, Petitioner filed an Affidavit in Opposition to Respondent's Motion for Summary Judgment which was signed by Petitioner's son and which alleged a factual dispute between the parties.

On October 20, 1980, the Trial Court ruled that the Affidavit in Opposition to Respondent's Motion for Summary Judgment filed October 17, 1980, created an issue of material facts as to two (2) items of furniture. The Court ruled that the Amended Affidavit in Opposition filed October 10, 1980, was legally insufficient. The Court granted Summary Judgment for Respondent except as to the two (2) items of furniture and the amount of attorney's fees, if any.

By Order dated October 3, 1980, Petitioner was permitted to file a Counterclaim. Because it was not timely filed,

it was subject to a Motion to Strike and was appropriately stricken from the record on December 1, 1980.

At trial on January 13, 1981, Petitioner voluntarily withdrew his Affirmative Defense which raised the issue of rejection as to the two items of furniture.

Petitioner advised the Court that the only issue left was attorney's fees and then moved for a Continuance for the third time.

The Trial Judge denied the Motion noting that if Petitioner's testimony was necessary it could have been secured prior to the time of trial by deposition.

No witnesses appeared at the trial and no testimony was presented on behalf of Petitioner not because he was deprived of due process of law, but because Petitioner chose not to avail himself of the applicable provisions in the Florida Rules of Civil Procedure which would have insured presentation of his case.

ARGUMENT

Petitioner brings his Petition for Review on the basis that the Trial Court denied Petitioner a Continuance which Petitioner argues had the same effect as if the Trial Judge ruled that Petitioner could not be present, present evidence, and cross-examine. Petitioner's assertion is incorrect. However, Petitioner is correct in his contention that he is entitled to due process of the law. The facts of the case and the law applicable thereto do not support Petitioner's conclusion that he was denied due process of the law. Petitioner attempts to assert a deprivation of due process of law to rationalize his inattention, misfeasance and nonfeasance in dealing with the litigation at hand. Rather, Petitioner was accorded all protection contemplated by the Fifth and Fourteenth Amendments to the U. S. Constitution and Art. I, §9, Fla. Const.

Petitioner moved for continuances three (3) times during the course of the Trial Court proceedings. The first Motion was granted in order to allow Petitioner more time to prepare Affidavits to present in oppostion to Respondent's Motion for Summary Judgment. The Trial Court continued Respondent's Summary Judgment hearing for 17 days. This continuance was granted because Petitioner was out of the country and more time was needed to obtain Affidavits in Opposition. The Affidavit Petitioner originally filed was stricken from the record because it had not been signed by Petitioner as stated, but was signed by Petitioner's son.

The second Motion to Continue was also made in connection with the same Motion for Summary Judgment filed by Respondent. Petitioner also filed a Motion to Dismiss at the same time.

Because Respondent had filed an Amendment to Complaint rather than an

Amended Complaint, because Petitioner's right to raise the objections included in his Motion to Dismiss had been waived in his prior Answer, and because this was the only ground for the Motion to Continue hearing, the Trial Court correctly struck the Motion to Dismiss and denied the second Motion to Continue the hearing.

The third Motion for Continuance was presented orally at the trial on January 13, 1981, and was based on Fla. R. Civ. P. 1.460, unavailability of a witness, but made no showing when the witness might be available. This is required by the rule.

Although this rule gives the Court discretion to grant a continuance, certain facts must be recognized.

This action had been pending for almost seven (7) months, and in order to defend the claim Petitioner should have known his testimony could be important. No Affidavits were ever submitted from Petitioner himself nor was his deposition ever taken.

On several occasions, the Trial Court pointed out to Petitioner's counsel that such Affidavit or deposition should be obtained if he felt such testimony was necessary. This is indicated by the comments of the Trial Judge, the Honorable Maurice M. Paul, now U.S. District Court Judge, Northern District of Florida. Judge Paul responded to the oral Motion for Continuance found on Page 5 of the Trial transcript as follows:

> "I'll deny it. We've talked about this before. I'm sure there's provisions. You could have had his testimony taken over there if you really need it. Besides, there is no assurance that he'll every get back in this country. So, we can't keep the trial open forever. So, we'll go ahead and proceed."

Fla. R. Civ. P. §1.330(3) provides:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the

deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desireable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open Court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

The rule was intended for just such an occasion as was presented in the instant case, yet no attempts were made to utilize such provision.

Finally, prior to making the Motion to Continue, Petitioner had voluntarily chosen to drop its Affirmative Defense, which he had the burden to prove. The denial of the Motion to Continue therefore, did not prejudice Petitioner.

Throughout the proceedings, Petitioner was granted every fairness provided by the law. Respondent brought a proper Motion which was granted only as to those issues where there was no material dispute

as to fact. Petitioner had notice of the hearing and time in which to prepare his opposition to it. In light of the foregoing, Petitioner was not denied due process of the law.

It should also be noted that the Affidavit of Jeffrey A. Bernstein found in Petitioner's Appendix, Page 12, is dated April 28, 1981, and was therefore, obtained more than three (3) months after the conclusion of the Trial Court proceedings. Further, the Affidavit and the documents relating to it, found on Pages 12-22 of Petitioner's Appendix, were never submitted until the Appeal filed on February 25, 1981, with the Florida District Court of Appeal, Fifth District. The Affidavit and documents should not be considered by the Court and should not be a part of the record in this case.

Further, Petitioner was not denied due process of the law when the Trial Judge awarded Respondent attorney's fees

because Petitioner failed to present a meritorious defense.

The Trial Court's award of attorney's fees pursuant to §57.105, Fla. Stat., was proper and in keeping with the ruling in Allen v. Estate of Dutton, 384 So.2d 171, (Fla. 5th DCA 1980). The Allen case not only holds that the requirement of a finding of a total or absolute lack of justiciable issue is tantamount to a finding that the action is frivolous, but it goes further to explain the definition of frivolous through the use of Treat v. State, ex rel. Mitton, 163 So. 833 (1935). This definition of a "frivolous appeal" states in part that:

> "It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed."

This aptly describes the defenses of Petitioner, which the Trial Court found to be "paper defenses" (A-1).

Petitioner states that he was unable to present evidence at trial despite due diligence to do so.

Petitioner was not diligent. Nowhere in the file does there appear an Affidavit signed by Petitioner prior to Trial. Nowhere in the file does there appear a deposition of Petitioner. It does not appear that Petitioner made any attempt to review the documentation involved in this case prior to Trial. The documents involved in this matter are relatively few and due diligence would have necessitated the forwarding of these documents to Petitioner for his review. Apparently, this was not done. The decisions of the Florida District Court of Appeal, Fifth District, and the Florida Supreme Court affirm the correctness with which the Trial Court dealt with this matter. Petitioner was not denied due process of law. He simply did not act in a diligent manner and take advantage of the Florida Rules of Civil

Procedure, and to comply with those rules when compliance was required.

None of the decisions relied on by Petitioner are applicable and are all distinguishable on their facts. It is most important to note that Petitioner was not barred from participating in this litigation. Petitioner could have presented his case through the means previously cited herein. However, Petitioner refused to employ the remedies provided by the American judicial system that where available to him so that he could defend himself, bring claims and address grievances. Now he wants this Court to find that he was deprived of due process, when the wrongs of which Petitioner complains resulted from his failure to use due diligence in handling his case.

CONCLUSION

For all of the reasons cited previously within this brief, Respondent respectfully requests that the Court dismiss the Petition for Writ of Certiorari filed by Petitioner, render summary affirmance, or deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

Harry W. Lawrence, Esq.
Lawrence, Griffin & Landis
Suite 650
Two West Central Boulevard
Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

Donald E. Grincewicz, Esq.
David M. Landis, Esq.
Lawrence, Griffin & Landis
Suite 650
Two West Central Boulevard
Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

February 28, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1193

MOHAMMAD H. MARASHI, Petitioner

-v-

FORBES FURNITURE COMPANY and
PEERLESS INSURANCE COMPANY,
Respondents.

APPENDIX

Harry W. Lawrence, Esq.
Lawrence, Griffin & Landis
Suite 650
Two West Central Boulevard
Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

Donald E. Grincewicz, Esq.
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Orlando, Florida 32801
(305) 425-2518
Counsel for Respondent

February 28, 1983

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28 U.S.C. §2101. 14

Fla. R. Civ. P. 1.330. 15

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IN THE CIRCUIT COURT
OF ORANGE COUNTY,
FLORIDA

CIVIL NO. 80-6619

FORBES FURNITURE COMPANY, a Florida corporation, d/b/a FURNITURE SHOWCASE,

Plaintiff,

vs

MOHAMMAD H. MARASHI,

Defendant.
_____/

ORDER

After due notice by or to all parties affected, a hearing was held before the court with respect to the matters disposed of by this order.

Upon consideration it is ORDERED that:

Upon the evidence presented, the court finds that the Plaintiff is entitled to recover attorney fees in this proceeding under Fla. Stat. 57.105(1979), there being an absence of law or fact on the paper defense presented by the Defendant.

Plaintiff is entitled to recover the sums of $24,723.23 as amount due from the Defendant, plus costs of $354.62, attorney fees of $7,000.00, and is entitled to return of three (3) Ficks Bar Stools.

In accordance with Fla. Stat. §76.31 (1979) the judgment to be entered herein shall be entered against the surety, PEERLESS INSURANCE COMPANY, in the amount of $30,341.54.

The value of the property retaken by the Defendant under the forthcoming bond is in excess of $25,000.00, and is the sum set forth in "exhibit one" to the Order for Writ of Attachment dated June 27, 1980.

DONE AND ORDERED in chambers at Orlando, Florida this 20th day of January, 1981.

Orlando, Florida,

/s/ Maurice M. Paul
Judge

Copies:
David M. Landis, Esq., 605 E. Robinson St., Orlando, Fla., 32801
Kenneth M. Meer, Esq., P. O. Drawer B, Winter Park, Florida, 32790

27-64

IN THE CIRCUIT COURT
OF ORANGE COUNTY,
FLORIDA

CIVIL NO. 80-6619

FORBES FURNITURE COMPANY,
a Florida corporation,
d/b/a FURNITURE SHOWCASE,

Plaintiff,

vs

MOHAMMAD H. MARASHI,

Defendant.
_____/

FINAL JUDGMENT

This action was tried before the Court. On the evidence that was presented and upon consideration,

IT IS ADJUDGED:

1. Plaintiff shall recover from Defendant, MOHAMMAD H. MARASHI, the sum of $24,723.23 as payment due Plaintiff by Defendant, plus interest in the amount of $917.70, plus costs of $354.62, plus attorney's fees in the amount of $7,000.00,

said amount totaling $32,995.55 for which let execution issue.

2. The surety, Peerless Insurance Company, pursuant to Release of Attachment Bond, is holding the sum of $30,341.54 for purposes of assisting in payment of any judgment entered herein against Defendant. Therefore, in accordance with Florida Statutes §76.31, the Plaintiff shall have and recover from Peerless Insurance Company the sum of $30,314.54 for which let execution issue.

3. The value of the property rotaken by Defendant under the above referenced bond is in excess of $25,000.00, and is the sum set forth in Exhibit "1" to the Order for Writ of Attachment dated June 27, 1980.

4. Plaintiff is lawfully entitled, pursuant to Florida Statutes 78.19, to the

return of three (3) Ficks Bar Stools, value of which according to Plaintiff is approximately $750.00, and Defendant shall make such property available to the Plaintiff and voluntarily surrender possession of same.

DONE AND ORDERED at Orlando, Florida this 26th day of January, 1981.

/s/ Maurice M. Paul
Circuit Judge

Copies:
David M. Landis, Esq., 605 E. Robinson St., Orlando, Fla., 32801
Kenneth M. Meer, Esq., P. O. Drawer B, Winter Park, Florida, 32790
Peerless Insurance Company, c/o Way, Sanderson & Jones, 611 N. Magnolia, Orlando, Florida

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT

MOHAMMAD H. MARASHI,

Appellant,

v.

FORBES FURNITURE COMPANY, a Florida corporation, d/b/a FURNITURE SHOWCASE,

Appellee.

_____/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 81-269

Decision filed April 7, 1982

Appeal from the Circuit Court
for Orange County,
Maurice M. Paul, Judge.

Thomas F. Lang of
Swann and Haddock, P.A.
Orlando, for Appellant.

David M. Landis of
Clayton & Landis,
Orlando, for Appellee

PER CURIAM.

AFFIRMED.

ORFINGER, UPCHURCH, F., and COWART, JJ.,
concur

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

MOHAMMAD H. MARASHI,

Appellant,

v. CASE NO. 81-269

FORBES FURNITURE COMPANY, etc.,

Appellee.
_____/

DATED: May 12, 1982

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, filed April 20, 1982, is hereby denied.

I hereby certify the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

By: /s/ Rowland W. Halliday
Deputy Clerk

(COURT SEAL)

cc: Thomas F. Lang, Esquire
David M. Landis, Esquire

IN THE CIRCUIT COURT
OF ORANGE COUNTY,
FLORIDA

CIVIL NO. 80-6619

FORBES FURNITURE COMPANY,
a Florida corporation,
d/b/a FURNITURE SHOWCASE,

Plaintiff,

vs.

MOHAMMAD H. MARASHI,

Defendant.
_____/

ORDER

After due notice by or to all parties affected, a hearing was held before the court with respect to all matters disposed of by this order.

Upon consideration it is ORDERED that:

Motion for Relief from Judgment is DENIED.

DONE AND ORDERED in chambers at Orlando, Florida this 17th day of June, 1982.

Orlando, Florida,

/s/ Maurice M. Paul
Judge

Copies:

Donald E. Grincewicz, Two W. Central Blvd., Orlando, Fla., 32801
Kenneth M. Meer, Esq., P. O. Drawer B, Winter Park, Fla., 32790
William L. Whiteacre, Esq., 170 E. Washington St., Orlando, Fla., 32801
Thomas F. Lang,. Esq., P. O. Box 7838, Orlando, Fla., 32854

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

MOHAMMAD H. MARASHI,

Appellant,

v. CASE NO. 82-985

FORBES FURNITURE COMPANY, etc.,

Appellee.
_____/

DATED: August 26, 1982

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION TO DISMISS APPEAL, filed August 9, 1982, is granted and the above-styled appeal is hereby dismissed.

I hereby certify the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

By: /s/ Rowland W. Halliday
Deputy Clerk

(COURT SEAL)

cc: Donald E. Grincewicz, Esquire
Paul H. Bowen, Esquire

IN THE SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 30, 1982

MOHAMMAD H. MARASHI, **

Petitioner, **

v. ** CASE NO. 62,671

FORBES FURNITURE ** COMPANY, a Florida ** corporation, d/b/a ** FURNITURE SHOWCASE, **

Respondent. **

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. St. Paul Title Insurance Corp v. Davis, 392 So.2d 1304 (Fla. 1980).

A True Copy
TEST:

/s/
Sid J. White
Clerk Supreme Court

cc: Paul H. Bowen, Esq.
Donald E. Grincewicz, Esquire of Lawrence, Griffin & Landis

IN THE SUPREME COURT OF FLORIDA
TUESDAY, OCTOBER 5, 1982

MOHAMMAD H. MARASHI,	**	
Petitioner,	**	
v.	**	CASE NO. 62,686
FORBES FURNITURE COMPANY, a Florida corporation, d/b/a FURNITURE SHOWCASE,	**	District Court of Appeal, 5th District
	**	No. 82-985
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Pena v. Tampa Federal Savings and Loan Assn., 385 So.2d 1370 (Fla. 1980).

No Motion for rehearing will be entertained by the Court.

A True Copy
TEST:
/s/
Sid J. White
Clerk Supreme Court

C
cc: Hon. Frank J.Habershaw, Clerk
Hon. William D. Gorman, Clerk
Hon. Maurice M. Paul, Judge
Paul H. Bowen, Esquire of Swann & Haddock
Donald E. Grincewicz, Esquire

28 U.S.C. §1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

28 U.S.C. §2101. SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

RULE 1.330. USE OF DEPOSITIONS IN COURT PROCEEDINGS.

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desireable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open Court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness."

RULE 1.460. CONTINUANCES

"(a) Motion For. A motion for continuance may be made only before or at the time the case is set for trial, unless good cause for failure to do so is shown or unless the ground for the motion arose after the action was set for trial.

(b) Contents. The motion shall be in writing. It shall state fully and clearly all of the facts which the movant conceives may entitle him to a continuance. If continuance is sought on the ground of non-availability of a witness, the motion must show when it is believed the witness will be available.

(c) For What Time. No continuance shall be granted for any longer time than the ends of justice require."